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PP v. CHIEN GUAN CHAI & ANOR AND ANOTHER APPLICATION

HIGH COURT MALAYA, GEORGETOWN
AKHTAR TAHIR J
[CRIMINAL APPLICATIONS NO: PA-44-2-01-2020
B & PA-44-3-01-2020]
24 JUNE 2020

CRIMINAL PROCEDURE: *Bail – Unbailable offence – Notice of motion seeking order for electronic monitoring device to be attached to accused persons seeking bail* C *– Whether compulsory for electronic monitoring device to be attached to accused persons – Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 26E – Security Offences (Special Measures) Act 2012, s. 13 – Application of art. 8 of Federal Constitution*

D The Public Prosecutor filed two similar notices of motion seeking an order from the High Court that an electronic monitoring device ('EMD') be attached to both the respondents pursuant to s. 13 of the Security Offences (Special Measures) Act 2012 ('SOSMA'). The motion was filed in response to the order of the High Court where bail was allowed for both the respondents who were earlier charged under s. 26E of the Anti-Trafficking E in Persons and Anti-Smuggling of Migrants Act 2007 ('ATIPSOM'). The respondents, prior to this, had filed a notice of motion in the High Court to seek bail pending trial. This court had allowed a bail of RM20,000 with one surety for both respondents and ordered all travel documents of the respondents to be deposited with the court until their trial had been F concluded. The issues that arose were (i) whether s. 26E of the ATIPSOM was a bailable, non-bailable or unbailable offence; (ii) whether it was compulsory for an EMD to be attached to an accused if bail was granted; and (iii) the application of art. 8 of the Federal Constitution.

Held (dismissing applications):

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(1) Section 26E of the ATIPSOM is a non-bailable offence as there is still powers for the court to grant bail, and not an unbailable one. However, a person seeking bail for this offence must fall within the exceptions provided under s. 13(2) of the SOSMA before bail could be considered. This court had granted bail for both respondents based on medical H grounds. The provision in s. 13(2) of the SOSMA, however, did not state whether it was mandatory or otherwise for a person to be attached with EMDs before bail could be allowed for security offences. (paras 14 & 18)

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(2) Section 388A(6) of the Criminal Procedure Code ('CPC') states that where an application is made by the Public Prosecutor, the court shall, with due regard to the nature of the offence and the circumstances of the case, order for the person to be so attached with an EMD *in lieu* of the execution of a bond. Emphasis of the terms 'apply' and 'application' in this section must be given, which tends to show that it is an application which naturally has to be considered rather than a direction which must be followed. Section 388A of the CPC nor s. 13 of the SOSMA makes it mandatory for an EMD to be attached on an accused upon an application by the Public Prosecutor. The discretion of whether or not to attach an EMD is still within the purview of the courts, even if an application is made by the Public Prosecutor. (paras 19, 20 & 22)

(3) The Public Prosecutor had only filed one affidavit-in-support in this application and only one reason was given on why this application was made. The reason stated by the applicant was not sufficient and was unfounded. Through the earlier applications made by the respondents, this court had allowed a bail of RM20,000 with one surety and for all travel documents of the respondents to be surrendered to the court. Adding additional conditions without any valid reasons would cause unfairness and injustice to the respondents who had not broken any conditions of the bail that was granted earlier. (paras 24 & 25)

(4) Article 8 of the Federal Constitution provides for equality of all persons charged with non-bailable offences and there should be no variance in setting out bail conditions for those charged with such offences whether or not it was under SOSMA, or any other legislation. Therefore, this court dismissed both applications made by the applicant for EMDs to be attached to the respondent. (paras 38 & 39)

Case(s) referred to:
PP v. Khairuddin Abu Hassan & Anor [2017] 4 CLJ 701 CA ***(refd)***
PP v. Wee Swee Siang [1948] 1 LNS 49 HC ***(refd)***
Raman Shunmugham lwn. PP [2019] 1 LNS 896 CA ***(refd)***

Legislation referred to:
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 26E
Criminal Procedure Code, s. 388A(5), (6)
Federal Constitution, arts. 5, 8, 9, 10, 13, 149
Security Offences (Special Measures) Act 2012, s. 13(1), (2), First Schedule

For the prosecution - Noor Azura Zulkiflee; DPP
For the accused - Ranjit Singh Dhillon & Md Yusoff Idriss; M/s Yusuf Idris & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Akhtar Tahir J:

The Facts

B **[1]** The Public Prosecutor had filed two similar notices of motion (seeking an order from the High Court that an electronic monitoring device ("EMD") to be attached to both the respondents pursuant to s. 13 of the Security Offences (Special Measures) Act 2012 ("SOSMA 2012").

[2] The motion was filed in response to the order of the High Court on C 7 January 2020 where bail was allowed for both respondents who were earlier charged under s. 26E of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("ATIPSOM 2007").

[3] The respondents prior to this, had filed a notice of motion (Cases no. PA-44-65-11-2019 and PA-44-66-11-2019) in the Penang High D Court to seek for bail pending trial. This Court had allowed a bail of RM20,000 with one surety for both respondents and ordered all travel documents of the respondents to be deposited with the court until their trial has been concluded.

[4] The application made previously in PA-44-65-11-2019 and PA-44-66-E 11-2019 by the respondents were due to medical reasons and there was no appeal filed by the applicant (Public Prosecutor) towards the decision of this court.

The Law

F **[5]** Section 26E of the ATIPSOM 2007 is a penal provision which makes it an offence if any person makes, obtains, gives, sells or possesses a fraudulent travel or identity document for the purpose of facilitating an act of smuggling of migrants. The provision stipulates a punishment of imprisonment up to seven years or a fine between RM50,000 to RM500,000 G or both, if a person is convicted.

[6] The offence under s. 26E of the ATIPSOM 2007 which both of the respondents have been charged for is a "security offence" as deemed by the First Schedule of SOSMA 2012 as s. 26E of the ATIPSOM 2007 falls within Part III A of ATIPSOM 2007. Thus, s. 13 of the SOSMA 2012 would apply H to both respondents. Section 13 of the SOSMA 2012 states:

> Bail
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> 13. (1) Bail shall not be granted to a person who has been charged with a security offence.
>
> I (2) Notwithstanding subsection (1):
>
> (a) a person below the age of eighteen years;
>
> (b) a woman; or
>
> (c) a sick or an infirm person,

charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[7] Section 388A of the Criminal Procedure Code ("CPC") deals with electronic monitoring requirement for person released on bail. The provision states:

(1) Where a court has decided to release a person on bail under section 387 or 388, the court may, on its own discretion, order for an electronic monitoring device to be attached to the person.

(2) The court may, with due regard to the nature of the offence and the circumstances of the case as being sufficient to secure the person's attendance at his trial, order for an electronic monitoring device to be attached to the person *in lieu* of the execution of a bond.

(3) The court shall, before ordering a person to be attached with an electronic monitoring device under subsection (1), give the person and the Public Prosecutor an opportunity to be heard.

(4) The court shall not make an order for a person to be attached with an electronic monitoring device under subsection (1) if there is a person (other than the person to be monitored) without whose co-operation it will not be practicable to secure the monitoring.

(5) Notwithstanding subsection (1), the Public Prosecutor may apply to the court for any person to be so released on bail to be attached with an electronic monitoring device.

(6) Where the Public Prosecutor has made an application under subsection (5), the court shall, with due regard to the nature of the offence and the circumstances of the case, order for the person to be so attached with an electronic monitoring device *in lieu* of the execution of a bond.

[8] Therefore, by reading and observation of s. 388A of the CPC, it is clear that this provision aims to introduce EMD as an additional condition where bail is granted by the court with the view of securing attendance and avoiding flight risk.

Is Section 26E ATIPSOM 2007 A Bailable, Non-Bailable Or Unbailable Offence?

[9] The first matter which this court shall touch on is whether s. 26E of the ATIPSOM 2007 is a bailable, non-bailable or unbailable offence? Since the offence is considered to be a security offence, there is a specific provision under s. 13 of the SOSMA 2012 which relates to bail for the offence charged.

[10] Section 13(1) of the SOSMA 2012 generally states that any person who is charged with a security offence shall not be allowed bail. However, s. 13(2) of the SOSMA 2012 provides for an exception where bail is allowed

for three categories which are for a minor, a woman or for medical reasons and is subject to an application by the Public Prosecutor for an electronic monitoring device to be attached to the said person. However, security offences under Chapter VIA of the Penal Code (Act 574) and the Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770) are not allowed bail outright.

[11] Thus, a person charged under s. 26E of the ATIPSOM 2007 would be eligible to bail if they falls within the ambit of s. 13(2) of the SOSMA 2012. Therefore, it can be concluded that s. 26E of the ATIPSOM 2007 is not an unbailable offence where the court does not have the discretion to grant bail, because there is still room for bail to be allowed.

[12] Many provisions of the law have made the intention of the Parliament clear and explicit in stating that an offence is an unbailable offence. For example under the following statutes:

Section 41B Dangerous Drugs Act 1952

No Bail to be granted in respect of certain offences.

41B. (1) Bail shall not be granted to an accused person charged with an offence under this Act:

(a) where the offence is punishable with death; or

(b) where the offence is punishable with imprisonment for more than five years; or

(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

(2) Subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

Section 12 Firearms (Increased Penalties) Act 1971

No bail to be granted in respect of offences under this Act.

(1) Bail shall not be granted to an accused person charged with an offence under this Act.

(2) Subsection (1) shall apply notwithstanding any other written law or any rule of law to the contrary.

[13] The wordings of these statutes are clear and unambiguous which is that bail would not be allowed without providing for any exceptions, as the intention of the Legislature is portrayed in keeping those charged with these offence in custody. However for s. 13 of the SOSMA 2012, this is not the case as possibility for bail is still provided for.

[14] Thus, this court is of the view that s. 26E of the ATIPSOM 2007 is non-bailable offence as there is still powers for the court to grant bail, and not an unbailable one. However, a person seeking bail for this offence must fall within the exceptions provides under s. 13(2) of the SOSMA 2012 before bail can be considered. Therefore, this court had granted bail for both respondents (in the previous applications) based on medical grounds.

[15] This court's view is further fortified by the decision of the Court of Appeal in *Raman Shunmugham lwn. PP* [2019] 1 LNS 896 where it was held:

> Melalui pembacaan kami, peruntukan di bawah s. 13 SOSMA cukup jelas melalui sub-s. (2) bahawa peruntukan itu bukanlah satu halangan secara total terhadap jaminan. Sebaliknya, kami berpandangan peruntukan s. 13 SOSMA tidak ubahnya sama seperti peruntukan bawah s. 388 KTJ. Apa yang membezakan hanyalah kekecualian terhadap pemakaian peruntukan itu diberikan kepada tiga kategori orang yang sama bawah proviso bagi s. 388(1) KTJ. Manakala bagi SOSMA, kekecualian itu terdapat bawah sub-s. (2), s. 13 SOSMA. Oleh itu, pandangan kami jaminan masih boleh diberikan kepada tertuduh yang dipertuduhkan dengan kesalahan keselamatan sekiranya syarat-syarat yang diperuntukkan bawah sub-s. (2) dipenuhi. Oleh itu juga, s. 13 SOSMA bukanlah peruntukan yang sememangnya tidak boleh diberi jamin (unbailable). Dengan kata lain, kesalahan-kesalahan keselamatan (security offences) adalah kesalahan yang terjumlah kepada kesalahan 'non-bailable' di mana mahkamah masih mempunyai budi bicara untuk membenarkan tertuduh dilepaskan atas jaminan sekiranya syarat-syarat di bawah sub-s. (2) dipenuhi.

Is It Compulsory For An EMD To Be Attached To An Accused If Bail Is Granted?

[16] Finding that the offence under s. 26E of the ATIPSOM 2007 is a non-bailable offence, now this court must determine the crux of the application made by the Public Prosecutor which relates to the attachment of EMDs on both the respondents.

[17] Section 13(2) of the SOSMA 2012 states that a person charged with a security offence may be released on bail (excluding offences under Chapter VIA of the Penal Code and Special Measures Against Terrorism in Foreign Countries Act 2015) subject to an application by the Public Prosecutor that the person be attached with an EMD in accordance with the CPC.

[18] The provision does not state whether it is mandatory or otherwise for a person to be attached with an EMDs before bail can be allowed for security offences. This court finds further direction in s. 388A of the CPC. Section 388A(5) of the CPC allows the Public Prosecutor to apply to the court for an EMD to be attached to a person who is granted bail.

[19] Subsequently, s. 388A(6) of the CPC states that where an application is made by the Public Prosecutor, the court shall, with due regard to the nature of the offence and the circumstances of the case, order for the person to be so attached with an EMD *in lieu* of the execution of a bond.

[20] Emphasis of the terms "apply" and "application" in this section must be given, which tends to show it is an application which naturally has to be considered rather than a direction which must be followed.

[21] This court has also taken into account the intention of the Malaysian Parliament when s. 388A was inserted into the CPC. During the second and third readings of the Criminal Procedure Code (Amendment) Bill (No. 2) 2012 the Minister at the Prime Minister's Department on 17 April 2012 had stated:

> Fasal 8 rang undang-undang bertujuan untuk memasukkan seksyen baru 388A bagi membolehkan peranti pengawasan elektronik digunakan terhadap tertuduh. *Seksyen baru 388A ini memberi kuasa budi bicara kepada mahkamah untuk membuat perintah supaya tertuduh yang telah dibenarkan jaminan dipakaikan peranti pengawasan elektronik sebagai ganti kepada bayaran bon*. Sebelum membuat perintah tersebut, mahkamah hendaklah memberikan peluang kepada pendakwa raya untuk didengar. Mahkamah tidak boleh membuat perintah jika sekiranya terdapat pihak lain yang tanpa kerjasamanya peranti pengawasan elektronik tidak dapat dipakaikan kepada tertuduh. Pendakwa raya juga dibenarkan untuk memohon kepada mahkamah supaya seseorang tertuduh yang akan dibebaskan dengan jaminan dipakaikan peranti pengawasan elektronik dan mahkamah hendaklah memerintah supaya tertuduh itu dipakaikan peranti pengawasan elektronik sebagai ganti bayaran bon.
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> (Mukasurat 129; Penyata Rasmi Dewan Rakyat, Parlimen Kedua Belas, Penggal Kelima, Mesyuarat Pertama).
>
> (emphasis added)

[22] This court is of the opinion that s. 388A of the CPC nor s. 13 of the SOSMA 2012 makes it mandatory for an EMD to be attached on an accused upon application made by the Public Prosecutor. The discretion whether or not to attach an EMD is still within the purview of the courts, even if an application is made by the Public Prosecutor.

[23] Therefore, the argument by the prosecution that it is mandatory for an EMD to be attached to the respondents is erroneous.

[24] Now after putting those issues to rest, the court must now determine whether the grounds provided by the applicant (prosecution) for EMDs to be placed on both respondents are justified. The Public Prosecutor had only filed one affidavit-in-support in this application and only one reason was given on why this application was made. This court refers to the affidavit in support (the contents of the affidavit-in-both applications are the same) filed by the applicant dated 10 January 2020 where para. 5 states:

5. Saya menyatakan kesalahan yang dipertuduhkan terhadap Responden adalah satu kesalahan yang non-bailable offence dan pemakaian EMD ini adalah penting bagi memastikan keberadaan Responden terutamanya kehadiran ke Mahkamah pada tarikh-tarikh sebutan dan bicara yang akan datang.

[25] This court is of the opinion that the reasons stated by the applicant in the affidavit-in-support is not sufficient and is unfounded. As stated, through the earlier applications made by the respondents, this court had allowed a bail of RM20,000 with one surety and for all travel documents of the respondents to be surrendered to the court. By adding additional conditions without any valid reasons would cause unfairness and injustice to respondents who have not broken any conditions of the bail that was granted earlier.

[26] At this juncture, this court refers to the decision of Callow J in *PP v. Wee Swee Siang* [1948] 1 LNS 49 where His Lordship had referred to the 2nd edn of *Mallal's Criminal Procedure Code* on points to be considered by the courts in determining bail. Even though this judgement refers to points to be considered in allowing or refusing bail, it provides much direction to the issue at hand as well, in reconsideration of bail conditions. His Lordship stated:

There are set out in the 2nd Edn of *Mallal's Criminal Procedure Code* at P. 377 nine points which the court may take into consideration when granting or refusing bail; they are:

(1) Whether there was or was not reasonable ground for believing the accused guilty of the offence. (On this the court was afforded no information. It could have been supplied by affidavit, *R v. Rutchinson* ILR 53 All at p. 938.

(2) The nature and gravity of the offence charged. (Clearly the alleged offence is grave).

(3) The severity and degree of punishment that might follow. (Extortion is receiving exemplary punishment; the maximum is three years imprisonment or fine or whipping, or any two of such punishments).

(4) The danger of the accused absconding if released on bail.

(5) His character, means and standing.

(6) The danger of the offence being continued or repeated.

(7) The danger of the witnesses being tampered with.

(8) Opportunity to the accused to prepare the defence.

(9) The long period of detention of the accused and probability of further period of delay. (Assuming the trial takes place on 23 as arranged, the period from arrest to trial will be ten days).

A Of those points Mr. Salt relied on number 8, and the Deputy Public Prosecutor in opposing the application urged number 7.

Naturally the primary consideration is to ensure the presence of the accused to stand his trial, and bail should not be refused lightly. A man is innocent until found guilty, and failing strong grounds he should be
B granted bail. (emphasis added)

[27] Perusal of the applicant's affidavit-in-support, this court does not find any reasons to revisit the bail stipulations that have been made by this court earlier.

C **[28]** This court also has seen no issue or predicament with the presence of the respondents in court and furthermore the respondents had attended all their court proceedings even after being released on bail including this case itself. Therefore, this court is of the view that there is no necessity for any additional terms to be added to the bail conditions of both the respondents and is satisfied with the bail decided earlier.

D

The Application Of Article 8 Of The Federal Constitution

[29] SOSMA 2012 is a legislation made pursuant to art. 149 of the Federal Constitution. The preamble of SOSMA 2012 states:

E An Act to provide for special measures relating to security offences for the purposes of maintaining public order and security and for connected matters.

[31 July 2012, P.U. (B) 256/2012]

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia-
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(1) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

(2) to excite disaffection against the Yang di-Pertuan Agong;

(3) which is prejudicial to public order in, or the security of, the
G Federation or any part thereof; or

(4) to procure the alteration, otherwise than by lawful means, of anything by law established;

AND WHEREAS Parliament considers it necessary to stop such action;

H **NOW, THEREFORE, pursuant to Article 149 of the Federal Constitution IT IS ENACTED by the Parliament of Malaysia** as follows:

(emphasis added)

[30] Article 149 of the Federal Constitution provides:

I Legislation against subversion, action prejudicial to public order, etc

(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or;

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

[31] From the reading of art. 149 of the Federal Constitution there is no ambiguity that laws against subversion, action prejudicial to public order can be made by the Parliament under this article even if it is inconsistent with arts. 5, 9, 10 or 13 of the Federal Constitution.

[32] However, other than arts. 5, 9, 10 or 13 of the Federal Constitution, SOSMA 2012 is still subjected to compliance to other provisions of the Federal Constitution.

[33] Article 8 of the Federal Constitution which provides for equality of all persons before the law must still be conformed to by SOSMA 2012. Article 8 of the Federal Constitution states:

Equality

8. (1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of

A any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

B (4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit:

C (a) any provision regulating personal law;

(b) any provisions or practice restricting office or employment ...

[34] As discussed earlier, s. 26E of the ATIPSOM 2007 is a non-bailable offence by virtue of s. 13 of the SOSMA 2012. In this court's view in regards to the attachment of EMDs that all persons charged for non-bailable offences D should be treated equally. Article 8 of the Federal Constitution has provided for fundamental liberties that all persons are equal before the law, therefore those who are charged for non-bailable offences should receive the same treatment.

E **[35]** It is not within the spirit of art. 8 of the Federal Constitution for additional conditions of bail to be stipulated for those charged for non-bailable security offences to be treated any differently from those charged with other non-bailable offences under any other legislation.

[36] Furthermore, the applicant had argued that the charge pursuant to F s. 26E of the ATIPSOM 2007 is a serious crime. This court is in agreement with this argument and also is of the view that s. 26E of the ATIPSOM 2007 is indeed a very grave offence to be charged with. However, other heinous and serious crimes which are non-bailable for example robbery, rape and culpable homicide have never been subjected to the attachment of EMDs.

G **[37]** This court refers to the judgment of the Court of Appeal in *PP v. Khairuddin Abu Hassan & Anor* [2017] 4 CLJ 701 where it was held that in interpreting SOSMA 2012 the court should be guided by the principle of giving full recognition to the fundamental rights and freedoms. The Court of Appeal stated:

H SOSMA is intended by the parliament to combat terrorism. The preamble of SOSMA shows that it is enacted to deal with four out of the six categories of action under art. 149(1) of the FC ie, paras. (a), (b), (d) and (f) and not the action under paras. (c) and (e). Further, the scheme and the provisions of SOSMA are designed to limit the fundamental liberties under arts. 5, 9, 10, and 13 of the FC and to depart from the procedures I laid down under the Criminal Procedure Code. Although SOSMA merely regulates the trial of the offences and does not create the said offences, undoubtedly a person charged and tried under SOSMA will lose his

liberty as he will be denied bail. Therefore, in interpreting SOSMA the court should be guided by the principle of giving full recognition to the fundamental rights and freedoms.

[38] Therefore, this court is of the view that art. 8 of the Federal Constitution does provides for equality of all persons charged with non-bailable offences and there should be no variance in setting out bail conditions for those charged with such offences whether or not is under SOSMA 2012 or any other legislation.

Decision

[39] Therefore, this court dismisses both applications made by the applicant for EMDs to be attached to the respondent. The bail conditions which have been determined in the previous applications by the respondent is maintained.